RECORD AND BRIEFS

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In the Supreme Court of the United States

PATRICK MCCRORY, GOVERNOR OF THE STATE OF NORTH CAROLINA, ET AL., APPELLANTS

v.

DAVID HARRIS, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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QUESTION PRESENTED

Whether the district court committed clear error in finding that Congressional Districts 1 and 12 in North Carolina's 2011 congressional redistricting plan are racial gerrymanders in violation of the Equal Protection Clause.

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INTEREST OF THE UNITED STATES

This case concerns the constitutionality of two congressional districts in a redistricting plan that North Carolina maintains was designed, in part, to comply with the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301 *et seq.* (Supp. II 2014).[1] The United States, through the Attorney General, has a direct role in enforcing the VRA. Accordingly, the United States has a significant interest in the proper interpretation of the VRA and the related constitutional protection against the unjustified use of race in redistricting.

STATEMENT

1. a. When drawing legislative districts, States must balance a complex array of often competing

[1] All references to Sections of the VRA are found in the 2014 Supplement of the United States Code.

concerns while adhering to constitutional and statutory mandates. See, *e.g.*, *Miller* v. *Johnson*, 515 U.S. 900, 915-916 (1995). Among other requirements, the Equal Protection Clause prohibits an unjustified, predominant use of race in drawing districts. See *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993) (*Shaw I*). Given the "sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments," courts must "exercise extraordinary caution" before concluding that district lines were drawn based on race. *Miller*, 515 U.S. at 916. But if race "was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district"—*i.e.*, if race was the "dominant and controlling rationale" for a district's lines—then that use of race withstands constitutional scrutiny only if it is narrowly tailored to serve a compelling state interest. *Id.* at 913, 916; see *id.* at 920.

b. The VRA imposes additional obligations on States concerning race and redistricting.

Section 2 of the VRA establishes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty.* v. *Holder*, 133 S. Ct. 2612, 2631 (2013). It prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. 10301(a). A violation of Section 2 is established when members of a minority group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b).

This Court has identified three "necessary preconditions" for a vote dilution claim under Section 2's results test: (1) The minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group must be "politically cohesive," and (3) white-bloc voting in the district must be sufficient "usually to defeat the minority's preferred candidate." *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986). "[O]nly when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances." *Bartlett* v. *Strickland*, 556 U.S. 1, 11-12 (2009). In other words, there can be no Section 2 liability for vote dilution based on district lines unless all three *Gingles* preconditions are met. *Voinovich* v. *Quilter*, 507 U.S. 146, 158 (1993).

At the time of the redistricting at issue here, Section 5 of the VRA required covered jurisdictions to obtain preclearance of voting changes by showing that they had neither the purpose nor the effect of discriminating based on race. 52 U.S.C. 10304(a).[2] Because 40 North Carolina counties were covered by Section 5, North Carolina had to show that its statewide map would not result in impermissible retrogression of a minority group's ability "to elect [its] preferred candidates." 52 U.S.C. 10304(b). To determine whether the redistricting plan was retrogressive, federal authorities would compare the new plan against the existing, or

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[2] In *Shelby County*, this Court held that the coverage formula in Section 4(b) of the VRA, 52 U.S.C. 10303(b), could no longer be used to require preclearance under Section 5. 133 S. Ct. at 2631. Thus, North Carolina need not currently seek preclearance of voting changes pursuant to Section 5.

"benchmark," plan, using updated census data in each and conducting a functional analysis of the minority community's ability to elect its preferred candidate. *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act*, 76 Fed. Reg. 7470-7471 (Feb. 9, 2011). That determination focused not on "any predetermined or fixed demographic percentages," but rather on localized electoral conditions and behavior, such as voter turnout, voting patterns, and voter registration. *Id.* at 7471.

2. This case involves the 2011 redrawing of two North Carolina congressional districts, Congressional District 1 (CD 1) and Congressional District 12 (CD 12). On four prior occasions, this Court has considered racial gerrymandering challenges to previous iterations of CD 12. See *Easley* v. *Cromartie*, 532 U.S. 234, 237-239 (2001) (*Cromartie II*) (explaining the procedural history); see also *Hunt* v. *Cromartie*, 526 U.S. 541, 551 (1999) (*Cromartie I*); *Shaw* v. *Hunt*, 517 U.S. 899 (1996) (*Shaw II*); *Shaw I*, 509 U.S. at 630.

Following the 1990 census and a remand in *Shaw I*, this Court, in *Shaw II*, struck down the 1992 version of CD 12 as unconstitutional because this Court found race had predominated in drawing the district in light of its extreme shape, history, demographics, and manner of splitting towns and counties. 517 U.S. at 902-903, 905-908. *Shaw II* further concluded that North Carolina's use of race in drawing CD 12 failed strict scrutiny as it was not narrowly tailored to compliance with either Section 2 or Section 5 of the VRA. The Court explained that CD 12 "could not remedy any potential § 2 violation," because the district's minority population failed to meet the *Gingles* requirement for compactness. *Id.* at 916. The Court further found

that North Carolina's race-based districting "was not required under a correct reading of [Section] 5." *Id.* at 911; see *id.* at 911-913.

In *Cromartie I* and *Cromartie II*, this Court considered a racial gerrymandering challenge to North Carolina's 1997 congressional redistricting plan, see *Cromartie II*, 532 U.S. at 237-239; and in *Cromartie II*, this Court overturned as clearly erroneous the district court's evidentiary determination that race predominated over politics in creating the 1997 version of CD 12, see *id.* at 241-243.

In 2001, the North Carolina legislature approved a new congressional districting plan, which went unchallenged. J.S. App. 9a.

3. Following the 2010 census, North Carolina was required to again redraw its legislative and congressional districts to account for population shifts.[3] Senator Robert Rucho and Representative David Lewis, the chairs of the North Carolina General Assembly's redistricting committees, engaged Dr. Thomas Hofeller to design and draw the congressional map. J.S. App. 9a-10a. Rucho and Lewis were the "sole sources of instruction" for Dr. Hofeller, and their instructions were provided orally without a written record. *Id.* at 10a.

Under North Carolina's 2001 congressional plan, no congressional district had a black voting-age population (BVAP) majority. J.A. 503. Even without a majority BVAP, African-American voters had long been able to elect candidates of their choice in both

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[3] According to 2010 census data, CD 1, as drawn under the 2001 congressional plan, was underpopulated by approximately 97,500 persons, J.S. App. 23a, while CD 12 was overpopulated by 2847 persons, J.A. 1341.

CD 1 and CD 12, such that their preferred candidates enjoyed wide margins of victory in every general election under the 2001 plan. See J.S. App. 7a-9a, 53a-54a.

Under the 2011 plan adopted by the General Assembly, the BVAP in CD 1 increased from 48.6% to 52.65% and from 43.77% to 50.66% in CD 12, according to 2010 census data.[4] J.S. App. 13a, 25a, 35a; J.A. 312 (Ansolabehere Expert Report). In November 2011, the Attorney General precleared the 2011 plan under Section 5 of the VRA. J.S. App. 13a-14a.

4. Appellees are registered voters residing in CD 1 and CD 12. They filed this suit alleging that both districts are unconstitutional racial gerrymanders. Appellants are the Governor of North Carolina and the Chairman of the State Board of Elections—both sued in their official capacity—and the North Carolina State Board of Elections. Following a bench trial, the district court determined that the drawing of CD 1 and CD 12 in the 2011 congressional redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment because racial considerations predominated in drawing each district and appellants failed to establish that the race-based districting satisfied strict scrutiny. J.S. App. 1a-61a. Judge Osteen concurred in part and dissented in part. *Id.* at 61a-90a.

a. The three-judge district court unanimously concluded that CD 1 "presents a textbook example of

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[4] The district court reported that CD 1's BVAP under the 2001 plan was 47.76%, see J.S. App. 13a, but it measured the 47.76% starting point using data from the 2000 census, see *id.* at 25a. Data from the 2010 census showed that CD 1's BVAP was 48.6% before implementation of the 2011 redistricting plan. See J.A. 373.

racial predominance." J.S. App. 20a. The court found "an extraordinary amount of *direct* evidence—including instructions by the legislators responsible for redistricting to Dr. Hofeller, the 'principal architect' of the 2011 Congressional Redistricting Plan—that a racial quota * * * [of a BVAP] of 50-percent-plus-one-person was established for CD 1." *Ibid.*

The district court determined, moreover, that the 2011 plan "prioritiz[ed] [a] mechanical racial target[] above all other districting criteria" in creating CD 1. J.S. App. 26a. It found that, "in order to achieve the goal of drawing CD 1 as a majority-BVAP district," Dr. Hofeller "subordinated traditional race-neutral principles" and "disregarded * * * respect for political subdivisions." *Ibid.* The court cited Dr. Hofeller's testimony that he split counties and precincts in order to exceed the 50% BVAP floor in CD 1, and that he made no attempt to measure compactness, and therefore was not even aware that CD 1's redrawn boundaries made the district less compact than under the 2001 plan. *Id.* at 26a-27a.

The district court also found no non-racial explanation for CD 1's substantial departures from traditional redistricting criteria. In particular, the court dismissed appellants' "passing argument" that they designed CD 1 to achieve incumbency protection and partisan advantage, finding "nothing in the record that remotely suggests CD 1 was a political gerrymander, or that CD 1 was drawn based on political data." J.S. App. 27a.

Having determined that race predominated in drawing CD 1, the court then examined whether race was necessary to achieve appellants' compelling interest in complying with the VRA. J.S. App. 45a-46a.

Section 2 of the VRA did not justify the predominant use of race, the court found, because appellants lacked evidence that CD 1 exhibited legally significant white-bloc voting, thus failing to establish the third *Gingles* precondition for Section 2 liability. *Id.* at 47a-51a. To the contrary, the court observed that African-American voters in CD 1 had been consistently able to elect their candidate of choice by wide margins even without a BVAP majority. *Id.* at 49a-50a. For the same reason, the district court found that appellants' use of a "mechanical BVAP target for CD 1 of 50 percent plus one person" was not needed to avoid retrogression under Section 5. *Id.* at 54a-55a.

b. The district court divided over whether race or politics predominated in drawing CD 12. The majority acknowledged that CD 12 "presents a slightly more complex analysis than CD 1," but ultimately concluded that race predominated over politics and other race-neutral districting criteria. J.S. App. 30a.

The district court first found direct evidence that appellants aimed to increase CD 12's BVAP to over 50%. See J.S. App. 30a-35a. The court credited Congressman Watt's testimony that Senator Rucho personally informed him that the legislature intended to "ramp up the minority percentage in [the Twelfth] Congressional District up to over 50 percent to comply with the Voting Rights Law."[5] *Id.* at 33a (citation omitted; brackets in original).

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[5] Although appellants disputed that Rucho made this statement to Watt, the district court explained that its credibility determination was "[b]ased on its ability to observe firsthand Congressman Watt and his consistent recollection of the conversation between him and Senator Rucho." J.S. App. 34a. The court further noted that appellants declined to call Rucho to testify, despite the fact

The district court also relied on a public statement by Rucho and Lewis that "[b]ecause of the presence of Guilford County," a Section 5 covered county in CD 12, "we have drawn our proposed Twelfth District at a black voting age level that is above the [BVAP] in the current [CD 12]." J.S. App. 31a (emphasis and citation omitted; third set of brackets in original). And the court cited North Carolina's submission to the Department of Justice (DOJ) for Section 5 preclearance, which stated that the redistricting committee drew CD 12 to address DOJ's past objection to the State's "failure * * * to create a second majority-minority district" in its 1992 congressional redistricting plan for CD 12. *Id.* at 32a (citation omitted).[6] The court construed these statements as demonstrating appellants' intent to create "a majority-minority district in CD 12" based on a misplaced concern that the district would not otherwise receive DOJ preclearance under Section 5 of the VRA. *Ibid.*; see *id.* at 33a.

In addition to the direct evidence that appellants adopted a racial target, the district court also relied on circumstantial evidence showing that "race predominated in the redistricting of CD 12." J.S. App. 43a. The court found particularly significant the "whopping" increase in CD 12's BVAP—from 43.77% to 50.66%—that "correlate[d] closely to the increase in

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that Rucho was listed as a defense witness and was "present throughout the trial." *Ibid.*

[6] In *Shaw II*, this Court held that North Carolina's predominant use of race was not narrowly tailored to Section 5 of the VRA, notwithstanding the State's claim that it drew the 1992 version of CD 12 as a majority-minority district in an effort to comply with DOJ preclearance requirements. 517 U.S. at 912-913; see *Miller*, 515 U.S. at 923-924.

[the BVAP for] CD 1." J.S. App. 35a. In light of the direct evidence that appellants sought to increase CD 12's BVAP above their 50% target, the court "decline[d] to conclude that it was purely coincidental that the district was now majority BVAP after it was drawn." *Id.* at 32a.

CD 12's highly irregular shape and new splits of political subdivisions along racial lines added to the court's inference that race predominated. J.S. App. 35a-36a. The court observed that, by one measure, CD 12 is the least compact in the State, and even less compact than the previous version of the district. *Ibid.*

The district court rejected appellants' claim that politics, rather than race, determined CD 12's boundaries. In making that claim, appellants relied on Dr. Hofeller's testimony that Rucho and Lewis instructed him "to treat [CD] 12 as a political district," J.S. App. 37a, and that he "did not look at race at all when creating" CD 12, *id.* at 38a. The court did not find that testimony credible, however, because it was contradicted by Dr. Hofeller's own trial and deposition testimony acknowledging that he was "instructed [not] to use race in any form *except* perhaps with regard to Guilford County," *ibid.* (citation omitted; brackets in original), and by his deposition testimony that "in order to be cautious and draw a plan that would pass muster under the [VRA], it was decided to reunite the black community in Guilford County into the Twelfth," *id.* at 39a (citation omitted). The political motivation for CD 12 was further discredited, the court noted, by Rucho and Lewis's contemporaneous attempts to "downplay the 'claim[] that [they] have engaged in

extreme political gerrymandering.'" *Ibid.* (citation omitted; brackets in original).

The district court also cited expert analyses by Drs. David Peterson and Stephen Ansolabehere as lending "circumstantial support" to its conclusion that race, rather than politics, predominated in the drawing of CD 12. J.S. App. 42a; see *id.* at 40a-42a. Peterson and Ansolabehere each testified that race better explained CD 12's boundaries than politics. *Id.* at 41a.

After concluding that race predominated in CD 12, the district court found the "strict-scrutiny analysis * * * straightforward" because appellants "completely fail[ed] to provide * * * a compelling state interest for the general assembly's use of race." J.S. App. 44a.

c. Judge Osteen dissented as to the finding of racial predominance with respect to CD 12.[7] J.S. App. 61a-90a. Although Judge Osteen found that race was one factor in CD 12's boundaries, *id.* at 71a, he declined to conclude that race, rather than politics, was appellants' predominant concern, *id.* at 84a. First, unlike the majority, Judge Osteen credited Dr. Hofeller's testimony that he relied on only political performance data to draw CD 12. *Id.* at 74a-75a. Judge Osteen further recognized that, although the majority "reache[d] an [e]minently reasonable conclusion," he would have interpreted the direct evidence as descriptive of "the resulting characteristics of CD 12 rather than * * * the weight that the legislature gave vari-

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[7] Judge Osteen concurred with the majority that race predominated in the drawing of CD 1 and that appellants failed to satisfy strict scrutiny. J.S. App. 61a. Judge Osteen further agreed that appellants would not satisfy strict scrutiny as to CD 12 if race predominated in that district. *Ibid.*

ous factors used to draw CD 12." *Id.* at 84a. Judge Osteen also concluded that because race correlated highly with political affiliation in CD 12, *Cromartie II* required appellees to present an alternative districting plan that could meet the legislature's political objective without entailing a comparable increase in the district's BVAP. *Id.* at 89a (citing *Cromartie II*, 532 U.S. at 234, 258).

SUMMARY OF ARGUMENT

The district court did not clearly err in finding that race predominated in the creation of CD 1 and CD 12, or in concluding that the use of race failed strict scrutiny in both districts. The judgment of the district court should therefore be affirmed.

I. The Equal Protection Clause prohibits the unjustified use of race as the "predominant factor" driving a challenged district's boundaries, *Alabama Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1267 (2015) (*Alabama*) (citation omitted), in "subordinat[ion] [of] traditional race-neutral districting principles," *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995). A legislature's adoption and prioritization of a racial target is not sufficient to establish racial predominance. Rather, to prove predominance, a plaintiff must further show that the racial target "had a direct and significant impact on" the district's configuration, *Alabama*, 135 S. Ct. at 1271, such that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing [the] district lines," *Miller*, 515 U.S. at 913.

While racial predominance is a demanding standard, a district court's finding of racial predominance is subject to review only for clear error. That standard

is highly deferential, particularly when the court's findings rest on credibility determinations.

II. A. Probative direct and circumstantial evidence support a finding that race predominated in CD 1. The district court properly relied on statements by Rucho and Lewis (the legislative leaders of the redistricting process) and the trial testimony of Dr. Hofeller (the lead mapmaker) to conclude that appellants established a racial target of "50-percent-plus-one-person" BVAP for CD 1. J.S. App. 20a. Although the adoption of that racial target does not itself prove that race predominated in drawing CD 1, the court further determined that other race-neutral factors were subordinated to race in determining the district's boundaries. In particular, the court found that, in order to achieve the goal of drawing CD 1 as a majority BVAP district, Dr. Hofeller, on instructions from Rucho and Lewis, disregarded traditional districting principles, such as respect for political subdivisions and compactness. And the record provided no support for appellants' political explanation for CD 1's boundaries, leaving race as the only explanation for the district's composition.

B. Appellants failed to show that their predominant use of race in CD 1 satisfied strict scrutiny. Appellants' reliance on Section 2 as a compelling reason for race-based districting in CD 1 cannot be reconciled with the evidence that the congressional candidates preferred by African-American voters consistently prevailed in CD 1 by wide margins even when they were without a BVAP majority. Given that success, there was no good reason to believe that white-bloc voting in the district usually would defeat minori-

ty voters' preferred candidates—a necessary precondition for taking action to avert a Section 2 violation.

III. The district court also did not clearly err in concluding that the highly irregular shape of CD 12 was predominantly driven by race rather than politics. The court reasonably construed appellants' public and private statements to signify appellants' intent to "ramp up" the district's BVAP to over 50%. J.S. App. 33a. The court also properly considered the substantial 7-point increase in CD 12's BVAP, to just over 50%, as evidence that appellants drew CD 12 predominantly to meet that 50%-plus-one racial target. *Id.* at 35a. In so doing, appellants disregarded traditional districting principles and divided political subdivisions, including Guilford County, along stark racial lines. That direct and circumstantial evidence was sufficient to support the district court's conclusion that race predominated in the creation of CD 12.

Appellants offered politics as the sole explanation for CD 12's boundaries and contended that the increase in CD 12's BVAP was merely a byproduct of the close correlation between race and politics in the relevant geographic area. See J.S. App. 36a-38a. But appellants' political case hinged on Dr. Hofeller's testimony that he considered only politics in drawing CD 12. See *id.* at 38a-39a. The district court permissibly discredited that testimony, which was contradicted by other statements Dr. Hofeller made at trial and in his deposition that he deliberately divided Guilford County according to race. And without Dr. Hofeller's testimony, appellants' political explanation for CD 12 essentially collapsed.

The strength and character of the direct evidence considered by the district court distinguishes this case

from *Easley* v. *Cromartie*, 532 U.S. 234 (2001), and also rendered an alternative map unnecessary. And, because the State offered no compelling justification for its predominant use of race in CD 12, the district court did not err in concluding that the district was an unconstitutional racial gerrymander.

ARGUMENT

I. RACIAL PREDOMINANCE IS A DEMANDING STANDARD, BUT A FINDING OF RACIAL PREDOMINANCE IS SUBJECT TO CLEAR ERROR REVIEW

A. This Court has held that the Constitution prohibits unjustifiably using race to "separat[e] voters into districts." *Miller* v. *Johnson*, 515 U.S. 900, 911 (1995). In assessing a racial gerrymandering claim, strict scrutiny applies only if "race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without" the district. *Alabama Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1267 (2015) (emphasis added) (quoting *Miller*, 515 U.S. at 916). To make that demanding showing "a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles * * * to racial considerations." *Miller*, 515 U.S. at 916. Subordination occurs when "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Id.* at 913; see *Shaw* v. *Hunt*, 517 U.S. 899, 905 (1996).

The existence of a racial target, standing alone, is insufficient to show that race predominated in the redistricting process because the racial target may end up playing little role in the actual drawing of district lines. And even when a racial target contributes in some measure to redistricting decisions, race

does not predominate when other, race-neutral factors are also given substantial weight. It is only when race overwhelms or dwarfs those other factors that the predominance standard is satisfied. See *Miller*, 515 U.S. at 913.

To establish racial predominance, a plaintiff may rely on "direct evidence going to legislative purpose" or "circumstantial evidence of a district's shape and demographics." *Miller*, 515 U.S. at 916. "In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to segregate voters on the basis of race." *Shaw* v. *Reno*, 509 U.S. 630, 646-647 (1993) (brackets, ellipses, citation, and internal quotation marks omitted). But when a district "is not so bizarre on its face that it discloses a racial design, the proof will be more difficult." *Miller*, 515 U.S. at 914 (brackets, citation and internal quotation marks omitted).

To assess whether race predominated, this Court has examined a wide variety of evidence, including statements by the "principal draftsman," *Shaw II*, 517 U.S. at 906; substantial deviations from traditional districting criteria, such as compactness and respect for political subdivisions, *e.g.*, *id.* at 905-906; stark racial disparities in the movement of persons in and out of the district that would be unusual if unintentional, *e.g.*, *Alabama*, 135 S. Ct. at 1271; a legislature's access to racial data and its lack of access to other data at the level of detail necessary to explain districting choices, *Bush* v. *Vera*, 517 U.S. 952, 962 (1996) (plurality opinion); and whether alternative explanations for the district's configuration are implausible or incomplete, *e.g.*, *Alabama*, 135 S. Ct. at

1271-1272. Making this showing is particularly difficult when race and political affiliation are highly correlated, and a State offers evidence that politics, rather than race, drove its districting decision. *Easley* v. *Cromartie*, 532 U.S. 234, 242 (2001); see *Hunt* v. *Cromartie*, 526 U.S. 541, 551-552 (2001). The "evidentiary difficulty" in discerning racial predominance, "together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916.

B. Although racial predominance is a demanding standard, when a district court applies the correct legal standard, a finding of racial predominance is subject to review only for clear error. *Cromartie II*, 532 U.S. at 241-242.

In applying the clear error standard, this Court will not reverse findings of fact simply because this Court "would have decided the case differently." *Cromartie II*, 532 U.S. at 242 (quoting *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985)). Instead, reversal is appropriate only when, on the basis of "the entire evidence," this Court is "left with the definite and firm conviction that a mistake has been committed." *Ibid.* (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). That means that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574. The clear error standard is particularly deferential when the district court's findings depend on credibility determinations. *Ibid.*

II. THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT CD 1 WAS RACIALLY GERRYMANDERED IN VIOLATION OF THE EQUAL PROTECTION CLAUSE

A. The District Court's Finding That Race Predominated In CD 1 Was Not Clearly Erroneous

Based on both direct and circumstantial evidence, the district court determined that race predominated in the drawing of CD 1. That conclusion is not clearly erroneous.

1. The district court first found "an extraordinary amount of *direct* evidence" that a racial target "of 50-percent-plus-one-person was established" for CD 1. J.S. App. 20a-21a. Rucho and Lewis stated repeatedly and publicly that CD 1 was drawn to ensure that it exceeded the majority-BVAP floor. *Id.* at 21a-22a. Dr. Hofeller confirmed that his express instruction from Rucho and Lewis was to "to draw [CD 1] with a black voting-age population in excess of 50 percent" to purportedly comply with Section 2 of the VRA. *Id.* at 23a.

Neither North Carolina's effort to comply with the VRA nor the existence of a racial target would alone establish racial predominance. But critically, in this case, the district court determined that, "to achieve the goal of drawing CD 1 as a majority BVAP district," the State "prioritiz[ed]" the racial target in the actual drawing of district lines, while "disregard[ing]" traditional districting principles such as "respect for political subdivisions and compactness." J.S. App. 26a (first set of brackets in original).

CD 1's departures from traditional redistricting standards were significant. Dr. Hofeller testified that he split counties and precincts whenever it was neces-

sary in order to exceed the 50% BVAP floor, J.S. App. 26a-27a, and Rucho and Lewis publicly confirmed that "most * * * precinct divisions were prompted by" the goal of creating a "majority black" district, J.A. 360; see J.S. App. 27a. CD 1 split many more political subdivisions than the previous version of the district. J.A. 1105-1107. And the portions of split counties included in CD 1 have a BVAP two-to-three times higher than the portions placed in neighboring congressional districts. J.A. 384-385, 495. Dr. Hofeller further admitted that he did not consider measures of compactness in drawing CD 1, and he was not aware that CD 1 was significantly less compact than its predecessor. J.S. App. 27a. The evidence therefore refutes appellants' claim (Br. 45) that the district court identified no "actual conflict" between traditional districting criteria and "the lines the legislature drew."[8]

The district court also found no non-racial explanation for CD 1's substantial departures from traditional redistricting criteria. Although appellants' argued that CD 1 had been configured for incumbency protection and partisan advantage, the court found "nothing in the record that remotely" supported that assertion. J.S. App. 27a.

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[8] Appellants are incorrect (Br. 45) in asserting that a district court must identify such an "actual conflict" in order to find that race predominated. While "actual conflict" evidence may be the most probative, a plaintiff may establish through other evidence that race was the dominant and controlling factor driving district lines. See U.S. Amicus Br. at 15-20, *Bethune-Hill* v. *Virginia State Bd. of Elections*, No. 15-680 (Sept. 14, 2016). Because the district court found an actual conflict, this case does not present the question whether such a finding is required.

The district court's conclusion that race predominated in the drawing of CD 1 was therefore based on substantial direct and circumstantial evidence. Under the clear error standard, there is no basis for overturning that determination.

B. Appellants Lacked A Substantial Basis In Evidence For Their Belief That Establishing CD 1 As A Majority-Minority District Was Necessary To Comply With The VRA

To satisfy strict scrutiny, a predominant use of race in drawing district boundaries must be narrowly tailored to advance a compelling state interest. See *Miller*, 515 U.S. at 920. Appellants principally contend (Br. 52-59) that they satisfied that standard because establishing CD 1 as a majority-minority district was necessary to comply with Section 2 of the VRA. The district court correctly rejected that contention.

1. This Court has assumed that States have a compelling interest in avoiding a violation of Section 2. See, *e.g.*, *Abrams* v. *Johnson*, 521 U.S. 74, 91 (1997); *Shaw II*, 517 U.S. at 915; *Vera*, 517 U.S. at 978 (plurality opinion); see also *Vera*, 517 U.S. at 990 (O'Connor, J., concurring) (recognizing that compliance with Section 2 is a compelling interest). No party disputes that point here. And with good reason. To conclude otherwise would place States in the impossible position of having to choose between compliance with a valid federal law and compliance with the Equal Protection Clause.[9] See *League of United Latin Am.*

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[9] For the same reason, a State also has a compelling interest in complying with Section 5, as eight Justices of this Court have previously recognized. See *League of United Latin Am. Citizens*

Citizens v. *Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part).

To justify the use of race, a State need not prove a Section 2 case against itself. Strict scrutiny is satisfied when a State has a "strong basis in evidence in support of the (race-based) choice that it has made." *Alabama*, 135 S. Ct. at 1274 (citation and internal quotation marks omitted). This standard does not require States "to get things just right." *Vera*, 517 U.S. at 978 (plurality opinion) (citation and internal quotation marks omitted). Instead, because the VRA often calls for intensely local and complex fact-bound determinations, the Court has provided States with appropriate leeway to avoid trapping States between competing constitutional and statutory requirements. See *Alabama*, 135 S. Ct. at 1273-1274. Thus, "legislators may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance." *Id.* at 1274

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v. *Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, J.J.); *id.* at 475 n.12 (Stevens, J., concurring in part and dissenting in part, joined in relevant part by Breyer, J.); *id.* at 485 n.2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.). Although the Court held in *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013), that the coverage formula in Section 4 of the VRA could no longer be used as a basis for requiring preclearance under Section 5, *id.* at 2631, that change in the law does not detract from the state's compelling interest in compliance with Section 5 prior to the decision. Cf. *Harris* v. *Arizona Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016).

(emphasis in original, internal quotation marks omitted).

To satisfy the strong basis in evidence standard, appellants were therefore required to show that they had good reason to believe that Section 2 required their use of race. A Section 2 violation cannot be established in this context, however, unless each of the three *Gingles* preconditions are proven: (1) The minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group must be "politically cohesive," and (3) white-bloc voting in the district must be sufficient "usually to defeat the minority's preferred candidate." *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986).

Rather than conducting that analysis, appellants mechanically set a 50%-plus-one BVAP target because they labored under the legal misconception that this Court's decision in *Bartlett* v. *Strickland*, 556 U.S. 1 (2009), mandated that CD 1 be drawn as a majority-minority district in order to avoid liability under Section 2 of the VRA. See J.S. App. 51a n.10. *Strickland*'s holding, however, concerned only the first *Gingles* precondition, adopting a bright-line rule that Section 2 applies in this context only where the minority group comprises at least 50% of the voting-age population in a potential election district. See *Strickland*, 556 U.S. at 12-23 (plurality opinion). But Section 2 liability also requires satisfaction of the other *Gingles* preconditions—including the existence of legally significant white-bloc voting. *Id.* at 24; see also *Shaw II*, 517 U.S. at 916.

2. The district court found that the third *Gingles* precondition was far from satisfied. Even though

African-American voters have constituted less than a majority in CD 1, the court observed that "CD 1 has been an extraordinarily safe district for African-American preferred candidates of choice for over twenty years." J.S. App. 53a. Indeed, in the one election that appellants describe as close (Br. 58), the African-American-preferred candidate won 60% of the vote. See J.A. 378. That electoral success in CD 1 resulted from a combination of politically-cohesive voting by the African-American community joined by significant white cross-over votes. Indeed, the State's own expert, Dr. Ray Block, reported that, in the 2010 congressional election, *59% of white voters* in CD 1 supported Representative G.K. Butterfield, who was also the overwhelming favorite of African-American voters.[10] J.S. App. 54a; see J.A. 956.

When African Americans have consistently elected their preferred candidate by wide margins, there is no basis to believe that white-bloc voting sufficient to satisfy the third *Gingles* precondition exists. Such "sustained success" undermines that claim. *Gingles*, 478 U.S. at 77 see also *Strickland*, 556 U.S. at 16 (plurality opinion) ("It is difficult to see how the majority-bloc-voting requirement could be met in a district where * * * white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate.").

To counter the district court's conclusion, appellants offer (Br. 56-59) only generalized, statewide evidence of white-bloc voting. The white-bloc voting

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[10] A second expert report, from Dr. Brunnell, includes no analysis of racially polarized voting by congressional district and thus does not address the degree of either white-bloc or white-crossover voting in CD 1. J.A. 971-1002.

inquiry under Section 2, however, does not concern whether white voters throughout the State vote in substantial numbers against minority-preferred candidates, but rather, whether white-bloc voting in the relevant district is sufficient "usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51; see *id.* at 56 ("The amount of white bloc voting that can generally minimize or cancel black voters' ability to elect representatives of their choice * * * will vary from district to district according to a number of factors.") (citations and internal quotation marks omitted).

Appellants also downplay (Br. 56-58) the significance of the historic pattern of white cross-over voting that permitted CD 1's African-American voters to elect their preferred candidate under "earlier versions of CD 1" by comfortable margins. But a pattern of racial-bloc voting that extends over time is the most probative evidence of what will happen in the future. *Gingles*, 478 U.S. at 57. Conversely, reliance on predictions about white-bloc voting untethered to past voting behavior risks redistricting based on racial stereotypes. See *Strickland*, 556 U.S. at 18 (plurality opinion) ("We must be most cautious before interpreting a statute to require courts to make inquiries based on racial classifications and race-based predictions.").

Likewise, appellants' speculation (Br. 57) about future electoral outcomes in CD 1 if voters were "blindly add[ed]" from the "majority-white" counties surrounding CD 1 does not constitute a strong basis in evidence for drawing the district to exceed a mechanical 50%-plus-one BVAP floor. Appellants did not make such assertions at trial, much less introduce any

evidence to support that newly manufactured concern.[11]

Based on the evidence before it, the district court therefore correctly concluded that appellants failed to justify their predominant use of race in drawing CD 1.[12]

III. THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT RACE PREDOMINATED IN CD 12

The district court determined that race, rather than politics, predominated in the drawing of CD 12. As Judge Osteen's dissent makes clear, the record in this case would have permitted a different conclusion. But the question on appeal is whether the district court permissibly reached the conclusion that it did, not whether it could have permissibly come out the other way. Because the district court's view of the evidence was reasonable, it "cannot be clearly erroneous." *Anderson*, 470 U.S. at 574.

A. Unlike CD 1, in which the use of a racial target was undisputed, appellants did not concede at trial that they adopted a racial target for CD 12. See J.S. App. 30a-43a. Nonetheless direct evidence supported

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[11] No need existed for appellants to "blindly add" voters to CD 1 from surrounding districts. Appellants could have, but did not, analyze the past behavior of voters added to the district from surrounding counties to determine whether bloc-voting rates by those new voters required augmentation of CD 1's BVAP to preserve African-American voters' ability to elect their preferred candidates.

[12] For essentially the same reason, appellants failed to establish that their use of race was necessary to comply with Section 5. Given the overwhelming success of minority-preferred candidates in CD 1, there was no need to increase the BVAP to more than 50% in order to avoid retrogression.

the district court's finding that appellants drew CD 12 to exceed a 50% BVAP floor.

First, the district court credited the testimony of Congressman Watt, CD 12's representative in 2011, that Senator Rucho told him that both CD 1 and CD 12 were to be drawn as majority-minority districts and that the goal was to "ramp up" the BVAP in CD 12 to over 50%. J.S. App. 33a-34a (citation omitted). The court's credibility assessment is entitled to great deference. *Anderson*, 470 U.S. at 575; see note 5, *supra*.

In finding that appellants set a racial target, the district court also relied on direct evidence—including Rucho and Lewis's July 1, 2011 statement and North Carolina's Section 5 preclearance submission—demonstrating that appellants adopted a 50%-plus-one racial target for CD 12 under the mistaken belief that Section 5 of the VRA required CD 12 to be drawn as a majority-minority district. See J.S. App. 32a; see also *id.* at 31a ("Because of the presence of Guilford County," a Section 5 covered county in CD 12, "we have drawn our proposed Twelfth District at a black voting age level that is above the [BVAP] in the current [CD 12].") (emphasis and citation omitted; third set of brackets in original); *id.* at 32a (claiming that the redistricting committee drew CD 12 to address DOJ's past objection to the State's "failure * * * to create a second majority-minority district" in its 1992 congressional redistricting plan for CD 12) (citation omitted). The court permissibly inferred that those statements did not merely describe the effect of the redistricting plan, but rather confirmed appellants' intent to ensure that CD 12 exceeded a 50% BVAP goal. *Id.* at 31a-33a; see *id.* at 84a (Osteen, J., dissenting) (find-

ing that the "majority reache[d] an [e]minently reasonable conclusion" that Rucho and Lewis's statement "is evidence of an intention to create a majority minority district").

The district also properly took into account the "whopping increase" in CD 12's BVAP from 43.7% to 50.66% of the district. J.S. App. 35a. The BVAP increase in CD 12 was consistent with the direct evidence that appellants adopted a 50%-plus-one BVAP floor for the district. The increase in CD 12's BVAP was also commensurate with the increase in CD 1's BVAP, where appellants concededly adopted and prioritized a racial target.[13] *Ibid.* And while the setting of a racial target is not alone sufficient to establish racial predominance, it provides evidence bearing on that inquiry where the target had "a direct and significant impact on" the district's configuration. *Alabama*, 135 S. Ct. at 1271.

Here, the district court not only found that a racial target was set and met, but it also found direct evidence that race was the predominant factor driving CD 12's district lines. In particular, Dr. Hofeller

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[13] The district court also found evidence of CD 12's racial target in Rucho and Lewis's June 17, 2011, public statement that "in constructing VRA majority black districts, the Chairs recommend that, where possible, these districts be drawn at a level equal to at least 50% plus one." J.S. App. 31a (emphasis and citation omitted). That statement, however, referred to majority-African-American districts in the state legislative plans, not the congressional plan. J.A. 1024. The evidence discussed above is nonetheless fully sufficient to support the district court's finding that appellants set a racial target. And given the weight that the district court attached to the remaining racial target evidence, J.S. App. 31a-35a, it is unnecessary to remand for the district court to reconsider that finding.

testified in his deposition that, in order to ensure compliance with Section 5, he "reunit[ed] the black community in Guilford County into the Twelfth." J.S. App. 39a; see *id.* at 37a-39a. The admission that appellants intentionally divided Guilford County along racial lines provides substantial evidence that race predominated in the drawing of CD 12: that change significantly affected the racial composition of CD 12. Indeed, the newly-added portions of Guilford County were critical to pushing CD 12 over the 50% BVAP threshold. See J.A. 499-502 (showing the BVAP and total population for Guilford County and CD 12 under 2010 census data).

There is also no question that CD 12 fails to conform to traditional districting principles. Under the prior 2001 plan, CD 12 was already the least compact district in the State and, under the 2011 plan, CD 12 became even less compact than its highly irregular predecessor. J.S. App. 35a-36a. The 2011 version of CD 12 splits more cities and towns than under the 2001 congressional districting plan. J.A. 312. There is also a stark racial disparity between the portions of Guilford, Mecklenberg, and Forsyth Counties drawn into and out of CD 12: the portions of each county included in CD 12 have an African-American population that is three-to-four times higher than the portions excluded. J.A. 384-385, 499.

Because there is a correlation between race and political affiliation in North Carolina, CD 12's highly irregular lines, and the racial disparity between those moved into and outside the district, do not alone prove that race, rather than politics, predominated. *Cromartie II*, 532 U.S. at 243. But in resolving the factual question of what best explained the extreme

departures from traditional redistricting criteria, the court could properly consider those disparities—in combination with the direct evidence that appellants drew CD 12 to exceed a racial target and divided Guilford County for racial reasons—as persuasive evidence that race, rather than politics predominated.

Appellants' contrary contention (Br. 28-30) that "overwhelming evidence" demonstrates that "politics, not race, predominated in the drawing of CD 12's district lines," largely boils down to a challenge to the district court's adverse credibility determinations. Appellants rely primarily on Dr. Hofeller's trial testimony that, on instructions from Rucho and Lewis, he considered only politics and not race in creating CD 12. For example, appellants argue (Br. 28-29) that Rucho and Lewis "specifically instructed Dr. Hofeller to treat [CD 12] as a political district and to draw it using political data," and contend that "Dr. Hofeller followed those instructions to a tee." (citation and internal quotation marks omitted); see *id.* at 17 (claiming it is "undisputed" that Dr. Hofeller "did not even look at racial demographics when drawing CD 12"); *id.* at 44 (contending that "absolutely nothing * * * refute[s] Dr. Hofeller's uncontradicted testimony that he drew CD 12 based solely on the results of the 2008 Presidential election").

The district court, however, did not find Dr. Hofeller's testimony credible, explaining that it was contradicted by his own trial testimony that he "was instructed [not] to use race in any form *except* perhaps with regard to Guilford County," J.S. App. 38a (citation omitted; brackets in original), and by his deposition, revealing he made changes to Guilford for racial reasons. *Id.* at 37a-39a. Appellants offer no basis for

disturbing the court's credibility determination, leaving them without any significant evidence that politics predominated over race.

The district court also reasonably found that Rucho and Lewis's contemporaneous efforts to "downplay the 'claim that [they] have engaged in extreme political gerrymandering,'" further impugned appellants' claim that politics predominated in CD 12. J.S. App. 39a (citation omitted, brackets in original). Although Rucho and Lewis's statement could be interpreted as an effort merely to "quell partisan opposition," see Appellants' Br. 35, the court reasonably took Rucho and Lewis's statement at face value as evidence that the political rationale for CD 12 "was more of a post-hoc rationalization than an initial aim." J.S. App. 40a.

Appellants also challenge (Br. 37-41) the validity of the expert testimony presented at trial. The district court, however, recognized the limitations of the experts' analyses and treated their conclusion that race better explained CD 12 than politics as only confirmatory of the other evidence of racial predominance. J.S. App. 41a-42a. The court's limited reliance on the expert analyses as corroborative evidence was not improper. See *Cromartie I*, 526 U.S. at 546 ("The task of assessing a jurisdiction's motivation * * * is not a simple matter; * * * it is an inherently complex endeavor, one requiring the trial court to perform a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.") (citation and internal quotation marks omitted).

B. This case is distinguishable from *Cromartie II*, where this Court reversed the district court's racial predominance determination after finding that the plaintiffs had adduced insufficient evidence to estab-

lish that the 1997 version of CD 12 was primarily driven by race, rather than politics. 532 U.S. at 242. To be sure, *Cromartie II* involved a congressional district that covered the same general area of the State. See *Cromartie I*, 526 U.S. at 544. But there are significant differences in the two districts and in the quality and character of the trial evidence.

First, unlike in this case, *Cromartie II* featured no direct evidence that a racial target was set. See 532 U.S. at 252-254. In contrast, the district court relied on Watt's testimony, Rucho and Lewis's July 1, 2011 statement, and the State's Section 5 preclearance submission as direct evidence that appellants adopted and prioritized a racial target for CD 12 and, even more significantly, split Guilford County for racial reasons to achieve that target. J.S. App. 33a-34a. The direct evidence in this case is therefore more probative of racial predominance than the statement in *Cromartie II* that referred only to the "racial and partisan balance" of the redistricting plan, but which did not suggest anything more than race consciousness. Cf. *Cromartie II*, 532 U.S. at 253-254 (citation omitted); see *id.* at 253-254.

Moreover, in the 1997 version of CD 12 at issue in *Cromartie II*, the district's BVAP *decreased* to 43% from the prior majority-minority district (53% BVAP) which had been invalidated by *Shaw II*. See *Cromartie I*, 526 U.S. at 544. In this case, by contrast, the increase in CD 12's BVAP from 43.77% to 50.66% significantly added to the inference that race was the predominant factor in drawing the district. J.S. App. 35a.

In addition, unlike in *Cromartie II* where "[c]redibility evaluations played a minor role," 532 U.S. at

243, the district court in this case discredited Dr. Hofeller's testimony that he considered only politics in drawing CD 12. And whereas in *Cromartie II*, there was strong direct evidence that political considerations predominated, here, Rucho and Lewis publicly disclaimed creating CD 12 as a political gerrymander. J.S. App. 39a. The evidence in this case therefore differs in significant respects from the evidence in *Cromartie II*.

Appellants are also incorrect (Br. 31-33) that *Cromartie II* required plaintiffs, as a matter of law, to provide an alternative map showing that the legislature could have equally satisfied its political goal while providing greater racial balance. *Cromartie II* established no such categorical rule. That reading of *Cromartie II* would be inconsistent with *Vera*, which affirmed a finding of predominant racial motive without such evidence. See *Vera*, 517 U.S. at 965-976. *Cromartie II* featured strong direct evidence of a political motive, weak direct evidence of a racial one, and a high correlation between race and political affiliation. "In a case such as th[at] one," a plaintiff seeking to prove racial predominance primarily through circumstantial evidence "must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles" and that "br[ing] about significantly greater racial balance." 532 U.S. at 258.

In this case, by contrast, substantial evidence of a racial motive existed, and the district court rejected appellants' political explanation for CD 12 based on witness credibility determinations. Circumstantial evidence in the specific form of an alternative map was

not necessary to further discount the political motivation already rejected by the district court.

* * * * *

Given the tight correlation between race and politics, as well as the centrality of the credibility determinations to the outcome, reasonable fact-finders could—and did—disagree about whether race or politics primarily drove CD 12's boundaries. Nonetheless, such differences of opinion do not demonstrate that the district court clearly erred in concluding that race predominated in the redistricting of CD 12. J.S. App. 35a.

Appellants offer no justification under the VRA or otherwise for their predominant use of race. They have instead staked their case entirely on the claim that race did not predominate in the drawing of CD 12. Because there is no basis for disturbing the district court's finding of racial predominance, the court's invalidation of CD 12 as an unconstitutional racial gerrymander must be affirmed.

CONCLUSION

The Court should affirm the district court's judgment as to both CD 1 and CD 12.

Respectfully submitted.

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